State of Michigan
House of Representatives
Oversight Committee
Testimony on HB 5193 and 5194
February 18, 2014

I am thankful for the opportunity to present testimony as to House Bill 5193 and 5194, pertaining to the Open Meetings Act, starting at MCL 15.270. My name is Lori Grigg Bluhm, and I am the City Attorney for the City of Troy, but I am here today as the president of the Michigan Association of Municipal Attorneys. Our legislative committee has reviewed the proposed revisions to the Open Meetings Act, and has made the following observations.

First, as to House Bill 5193, which seeks to amend Section 8 (e) of the Open Meetings Act, or MCL 15.268 (e)- which allows a public body, upon a 2/3 vote of the elected members, to convene a closed session to discuss pending litigation. The current language of the statute allows for a closed session for a public body "To consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body." The House Bill proposes to add the language "This subdivision does not authorize a closed meeting in connection with anticipated litigation."

Michigan attorneys are guided as to the application of this section by the Court's decision in the People v. Whitney case from 1998 (457 Mich. 890). In that case, a City Council discussed its adversarial relationship with the City Manager in a closed session. The City argued in the lawsuit that this closed session discussion was in anticipation of

litigation, and candidly admitted that there was no formal lawsuit or arbitration initiated at the time of the closed session. The Whitney Court acknowledged that the Open Meetings Act did not specifically define "pending litigation," and without indicating that the term was ambiguous, the Whitney Court proceeded to define the term with a "reasonable construction that provided the narrowest opportunity for closed meetings to be held." The Whitney Court specifically held that "pending litigation" does not extend to mere settlement negotiations before the institution of any type of proceeding in which a judge or arbitrator would be expected, absent a settlement, to ultimately render a decision.

Understanding that the Open Meetings Act is best served if it is clear and understandable to everyone, and that there is a desire to limit the availability of closed sessions for anticipated litigation, the MAMA legislative committee recommends the addition of the following sentence at the end of MCL 15.268 (e): "In order to qualify as pending litigation, there must be a formal adversarial proceeding initiated in a court or tribunal, and there must not have been a final order concluding the adversarial proceeding." This language is easily understood, and addresses both anticipated pre-lawsuit discussions, as well as post-lawsuit discussions.

Although this is not currently before the Oversight Committee, the MAMA legislative committee also asks for a minor clarification to Section 11, and more specifically MCL 15.271 (4), which provides that when there is an established violation of the Open Meetings Act, then the public body is responsible for paying "court costs and actual attorney fees for the action." By not specifying that the attorney fees must

be reasonable, this statutory provision allows for exorbitant and unjustified recoveries, even in those cases where there are minor clerical errors. It discourages competiveness, encourages prolonged and lengthy litigation, and could lead to hourly rates for Open Meetings cases that exceed what would otherwise be allowed in the marketplace. It also could lead to payment of attorney fees that extend beyond what is required to obtain compliance with the Open Meetings Act. There is also a concern that the current language, without the requirement of reasonableness, actually eliminates Court oversight. We know that there have been attorney fee awards that exceed $50,000 in sunshine law cases (Hammond Bay v. Miller). We also know that there have been requests to recoup attorney fees that exceed $500 per hour. The reimbursement of these costs is in addition to the municipality's own attorney fees and costs incurred in defending the lawsuit.

There is a reasonableness component in all other types of cases where there is a reimbursement of attorney fees provision, and the Courts are very adept at discerning the reasonableness of the requested hourly rates, as well as the necessity of the legal work performed. The insertion of the word "reasonable" will have no impact on the ability of citizens to obtain information about the decisions made by their governing bodies.

The MAMA legislative committee did not make any specific recommendations as to House Bill 5194, which seeks to add language to Section 10 (5) to preclude the use of a reenactment of a decision as a defense to a criminal or a civil action. Although this language is presumably intended to further discourage intentional violations of the Open Meetings Act, it may have the unintended consequence of discouraging the re-

enactment of decisions that are based on a defective procedure. Unlike other penal statutes, there is no affirmative defense under the currently existing Open Meetings Act. There is no shifting of the burden of proof or any procedural advantage to a person who is alleged to have intentionally violated the Act, and therefore it is uncertain why this language is necessary. This language may also unintentionally impinge on the constitutional rights of criminal defendants.

Thank you for the opportunity to provide testimony, and I am happy to address any questions that you may have.

Respectfully submitted:

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